TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 173.

JOE MALLOY, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED MAY 16, 1904.

(23,690)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1914.

1 I hereby certify that the attached papers constitute the record on writ of error in the case of Joe Malloy plaintiff in error vs. The State of South Carolina Defendant in error consisting of

1. Petition for Writ of Error.
2. Assignments of Error.
3. Order allowing same.
4. Writ of Error.
5. Præcipe.
6. Citation.
7. Proof of Service of said papers.
8. Part of record to be sent up as designated in the præcipe.
9. The prevailing opinion of the Supreme Court of South Carolina.
10. The Dissenting Opinion of Mr. Justice C. A. Woods.

May 7, 1913.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court S. C.

2 THE STATE OF SOUTH CAROLINA:

In Supreme Court, April Term, 1913.

THE STATE, Respondent,
vs.
JOE MALLOY, Appellant.

Petition for Writ of Error.

Now comes Joe Malloy, the appellant herein, and says: That on or about the 7th day of April, 1913, this court entered judgment herein in favor of The State of South Carolina, Plaintiff, and against this defendant, Appellant, in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this defendant in which he was denied rights claimed under the Constitution of the United States and in which he was sentenced to death under a statute which was in conflict with the Constitution of the United States but which the court held was valid, all of which will more fully appear in the assignments of error which are filed with this petition. That said court is the court of final resort in South Carolina.

Wherefore, the said appellant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

STEVENSON, STEVENSON & PRINCE,
Attorneys for Joe Malloy.

3 THE STATE OF SOUTH CAROLINA:

In Supreme Court.

THE STATE, Respondent,
vs.
JOE MALLOY, Defendant-Appellant.

Assignments of Error for Supreme Court of United States.

Joe Malloy, defendant-appellant, by his attorneys Stevenson, Stevenson & Prince, respectfully submits that the Supreme Court of the State of South Carolina erred in its decision in the above entitled case in adjudicating and deciding that Joe Malloy is punishable with death by electrocution under provisions of Act #402 of the Statutes at Large of South Carolina of 1912, page 702, which is as follows:

"No. 402.

"An Act to Prescribe the Method of Capital Punishment in South Carolina.

"SECTION 1. Be it enacted by the General Assembly of the State "of South Carolina, That after the approval of this act by the Gov- "ernor all persons convicted of capital crime and have imposed upon "them the sentence of death shall suffer such penalty by electrocution "within the walls of the State Penitentiary, at Columbia, under the "direction of the Superintendent of the Penitentiary instead of by "hanging.

"SEC. 2. The Board of Directors of the State Penitentiary are "authorized and required to provide a death chamber and all neces- "sary appliances for inflicting such penalty by electrocution and "pay the costs thereof out of any funds in their hands. The expense "of transporting any such criminal to the State Penitentiary shall be "borne by the county in which the offence was committed.

"SEC. 3. Upon the conviction of any person in this State of
4 "a crime, the punishment of which is death, it shall be the "duty of the Presiding Judge to sentence such convicted per- "son to death according to the provisions of this Act, and to make "such sentence in writing, which shall be filed with the papers in "the case against such convicted person, and a certified copy thereof "shall be transmitted by the Clerk of the Court of General Sessions "in which said sentence is pronounced to the Superintendent of the "State Penitentiary, at Columbia, not later than ten days prior to the "time fixed in the sentence of the Court for the execution of the "same, and in all cases it shall be the duty of the Sheriff of the "county in which such convicted person is so sentenced, together "with one deputy or more, if in his judgment it is necessary, to "convey such convicted person to the Penitentiary, at Columbia, to "deliver him or her to the Superintendent of the State Penitentiary "not more than twenty days nor less than two days prior to the

"time fixed in the judgment for the execution of such condemned "person, unless otherwise directed by the Governor, or unless a stay "of execution has been caused by an appeal, or granting of a new "trial, or other order of court of competent jurisdiction.

"SEC. 4. At such execution there shall be present the executioner "and at least two assistants, the Penitentiary surgeon and one other "surgeon, if the condemned person so desires, an electrician, the "condemned person's counsel and relatives, if they so desire, min-"isters of the gospel, not exceeding three, if they so desire, and "not less than twelve nor more than twenty-four respectable citizens "of this State, to be designated by the executioner.

"SEC. 5. The executioner and the attending physician shall certify "the fact of such execution to the Clerk of the Court of General "Sessions in which such sentence was pronounced, which certificate "shall be filed by the Clerk with the papers in the case.

"SEC. 6. The body of person so executed shall be delivered to rela-"tives; and in case no claim is made by relatives for such body the "same shall be disposed of as bodies of convicts dying in the State

"Penitentiary: Provided, That if nearest relatives or persons
5 & 6 "so executed desire that body be carried to former home, if
"in the State, the expenses for such transportation shall be "paid by the Penitentiary authorities, who shall draw their warrant "upon County Treasurer of county from which said convict came "and said County Treasurer shall pay same and charge to item of "Court expenses.

"SEC. 7. That all acts or parts of acts inconsistent with this act "are hereby repealed.

"Approved the 17th day of February, A. D. 1912."

Whereas said act as to any attempted application thereof to the alleged crime with which defendant is charged is ex post facto and void, under the provisions of the Constitution of the United States of America in that, at the time of the commission of the alleged crime, to wit, November 24th, 1910, the law in force in the State of South Carolina prescribing punishment for those convicted of murder without a recommendation to mercy was that which is found in sections 109-113 of the Criminal Code of South Carolina of 1902, providing that whoever is guilty of murder shall suffer the penalty of death, which act necessarily and properly carried with it the common law method of punishment by hanging.

The infliction, therefore, of a sentence upon appellant, which sentence was not legal at the time of the alleged commission of the crime, it is respectfully submitted, was in violation of the rights of appellant guaranteed him by the Constitution of the United States and claimed in this case, Art. 1, sec. 9, providing that no bill of attainder or ex post facto law shall be passed.

Respectfully submitted,

STEVENSON, STEVENSON & PRINCE,

Attorneys for Appellant Joe Malloy.

7 THE STATE OF SOUTH CAROLINA:

In Supreme Court.

THE STATE, Respondent,
vs.
JOE MALLOY, Defendant-Appellant.

Order Allowing Writ of Error.

It appearing that the defendant Joe Malloy is applying for a writ of error to the Supreme Court of the United States from the judgment of the Supreme Court herein and that he has raised a Federal question, now, on motion of Stevenson, Stevenson & Prince, defendant's attorneys,

It is ordered, that the writ be allowed and that the remittitur herein be stayed until the determination of the case in the Supreme Court of the United States.

EUGENE B. GARY,
Chief Justice Supreme Court of South Carolina.

Apr. 15, 1913.

A true copy.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

8 [Endorsed:] State of South Carolina. In Supreme Court. State vs. Joe Malloy. Order allowing writ of error. (Certified Copy.) Filed Supreme Court of S. C., Apr. 15, 1913. U. R. Brooks, Clerk. Stevenson & Prince, Attorneys-at-Law, Cheraw, S. C.

9 THE UNITED STATES OF AMERICA:

The Supreme Court of the State of South Carolina.

THE STATE
vs.
JOE MALLOY.

Writ of Error.

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings as also in the rendition of judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State, Plaintiff, and Joe Malloy, Defendant, wherein was drawn in question the validity of a treaty or statute or of an authority exer-

cised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute or of an authority exercised under said statute on the ground of their being repugnant to the Constitution, Treaties or Laws of the United States and the decision was in favor of such validity, or wherein was drawn in question the construction of a clause of the Constitution or treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said Constitution, Treaty, Statute or Commission, a manifest error hath happened to the great damage of the said defendant Joe Malloy, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things
10 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 15th day of May, A. D. 1913 in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of said Supreme Court, the 15th day of April, in the year of our Lord one thousand nine hundred and thirteen.

RICHARD W. HUTSON, [SEAL.]
Clerk District Court U. S. for
District of South Carolina.

Allowed Apr. 15th, 1913.

EUGENE B. GARY,
Chief Justice Supreme Court of South Carolina.

11 THE STATE OF SOUTH CAROLINA:

In Supreme Court.

THE STATE, Respondent,
vs.
JOE MALLOY, Defendant-Appellant.

Notice.

To Messrs. J. J. Evans, Townsend & Rogers, of Counsel for State; J. Monroe Spears, Solicitor, and Thomas H. Peeples, Attorney General:

You will please take notice that on prosecution of his writ of error to the Supreme Court of the United States from the Supreme Court of South Carolina, the plaintiff in error, Joe Malloy, will require the following parts of the record to be certified to the Supreme Court as the record:

1. The title of the case, together with page one of the printed case and the first four lines of page two thereof ending with the words "which is herein set out."

2. Beginning on page four of the printed record in the Supreme Court with the words "upon the assembly of the court" the seven lines and parts of lines ending with the words "November, 1910" in the middle of the last line of folio fourteen.

3. Beginning on page five, folio 18, with the words "on return of a true bill' insert all down to folio 22 on page 6 ending with the words "and ordered the trial to proceed."

4. Beginning immediately after the certificate of the stenographer on page 193 set out the proceedings as follows, beginning with the words "the jury found the defendant guilty" and set out the balance of that page, all of page 194 and all of page 195 down to and including the word "exceptions."

5. Set out the fourth exception, same being found on page 196.

12 6. Set out the opinions of the members of the Supreme Court.

7. Set out the assignments of error, the writ of error and order allowing the same and order staying remittitur in the case.

STEVENSON, STEVENSON & PRINCE,
Attorneys for Joe Malloy, Plaintiff in Error.

13 [Endorsed:] State of South Carolina. In Supreme Court. State vs. Joe Malloy. Præcipe. (Copy.)

14 UNITED STATES OF AMERICA:

To the State of South Carolina and J. Munroe Spears, Solicitor, and Thomas H. Peeples, Attorney General:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the Supreme Court of the State of South Carolina, wherein Joe Malloy is plaintiff in error and the State of South Carolina is defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 15 day of April, in the year of our Lord one thousand nine hundred and thirteen.

EUGENE B. GARY,
Chief Justice Supreme Court of South Carolina.

In the Supreme Court of the United States.

JOE MALLOY, Plaintiff in Error,
against
STATE OF SOUTH CAROLINA, Defendant in Error.

I hereby acknowledge due and legal service of the citation and præcipe in the above entitled case upon me.
Dated April 23, 1913.

THOS. H. PEEPLES,
Attorney General of So. Carolina.

I hereby acknowledge due and legal service of the citation and præcipe in the above entitled case upon me.
Dated April 23, 1913.

J. MONROE SPEARS,
Solicitor of Fourth Circuit.

Service accepted and copy received this 23rd day of April, 1913.
J. J. EVANS.

15 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1912, Fourth Circuit, Marlboro County.

T. H. Spain, Circuit Judge.

THE STATE, Respondent,
against
JOE MALLOY, Defendant-Appellant.

At the spring term of court for Marlboro county, a true bill was found in this case, and the defendant moved to quash the indictment on the ground that the same had been found by a grand jury drawn from a list made up by the Jury Commissioners, of whom N. B. Rogers, father of one of the boys charged to have been killed at the same time, and who was an active prosecutor in the case, had participated, and, also, that he had participated in the drawing of the grand jury.

The motion was sustained, and upon appeal to the Supreme Court it was held that the indictment was properly quashed, but they held that the jury lists were valid and all right, except as to these cases where Mr. Rogers was disqualified. Whereupon the Jury Commissioners not disqualified, together with the Superintendent of Education of Marlboro County, acting in the place of Rogers, as is provided by law, made up a new list for the jury boxes and drew a new grand jury, and drew the juries for this term from said new list; all of which was done in consequence of a petition and order which is herein set out.

Upon the assembling of the court at this term the grand jury

drawn in January made its final presentment and was dis-
16 charged; and the new grand jury, drawn as above, took charge and found the indictment in this case.

This was the usual indictment for murder, in which the defendant was charged with the murder of Prentiss Moore on the 24th day of November, 1910. * * *

On return of a true bill and when arraigned the defendant moved to quash the indictment on the ground that it was found by an illegal grand jury, for the reasons set forth in the challenge to the array of the grand jury, and such motion was overruled. He then plead in bar of capital punishment, and the plea was as follows:

The defendant Joe Malloy pleads specially and in bar to said indictment on the charge of murder without a recommendation to mercy on the ground:

That when the crime with which he is charged is alleged to have been committed the penalty when convicted of murder without recommendation to mercy was death with hanging, and that since that time the punishment by hanging has been abolished by law, and the punishment of death by electrocution has been substituted, and the said punishment therefore of death by hanging cannot be inflicted. He pleads the said statute of 1912 a bar of any trial for any crime the punishment for which has been abolished, and he alleges that punishment by electrocution cannot be inflicted, if he should be convicted of such crime for the reason that it is ex post facto law, and would be in violation of the Constitution of the United States and of the State of South Carolina; hence he demands the judgment of this court that the trial for murder without recommendation for mercy cannot be proceeded with, and the question of whether he is guilty with the recommendation of mercy is the only question to be tried.

STEVENSON, STEVENSON & PRINCE,
Defendant's Attorneys.

Filed July 1st, 1912.

The Court ruled that such plea should be made in arrest of judg-
ment, and ordered the trial to proceed. * * *

17 The jury found the defendant "guilty," whereupon, the defendant's counsel moved to arrest the judgment on the same grounds on which he plead in bar, to wit, that the infliction of death by electrocution was ex post facto as to him and could not be imposed, since it had not been the method at the date of the alleged crime, and it would be in violation of his rights, both under the Constitution of this State and under the Constitution of the United States to inflict the death penalty in a manner not provided by law when the alleged crime was committed. The motion was overruled, and the following sentence imposed:

Motion.

Now comes Joe Malloy, and for cause, why judgment can not be pronounced upon him on the verdict in the above stated case, says for an arrest of judgment:

That when the crime with which he is charged is alleged to have been committed the penalty when convicted of murder without recommendation of mercy was death by hanging, and that since that time the punishment by hanging has been abolished by law, and the punishment of death by electrocution has been substituted, and the said punishment therefore of death by hanging can not be inflicted. He also pleads the said statute of 1912 as a bar to the judgment and sentence to death by electrocution, and alleges same is an ex post facto law as to him, and sentence and punishment under it would be in violation of the Constitution of the United States and of the Stat- of South Carolina, hence he demands the judgment of the court that the judgment on the verdict can not be pronounced or enforced against him—and that he be discharged in the above case.

STEVENSON, STEVENSON & PRINCE,
Defendant's Attorneys.

Filed July 6, 1912.

It being solemnly demanded of the prisoner at the bar, Joe Malloy, if he hath anything to say why the court should not proceed to judgment, and after overruling his motion in arrest of judgment, and the said Joe Malloy having been duly arraigned for
18 sentence, and having answered that he hath nothing to say except what he has before said, whereupon, it is considered by the Court, and is the sentence of the court and the judgment of the law, that the said Joe Malloy be taken to the place from which last he came, and from thence conveyed to the State Penitentiary, at Columbia, S. C., as now provided by law, and that on Friday, the 9th day of August, A. D. 1912, between the hours of six a. m. and six p. m., on said day, he, the sai- Joe Malloy, do suffer death by electrocution within the walls of the State Penitentiary, under the direction of the superintendent of the penitentiary—and may God have mercy on his soul.

T. H. SPAIN,
Presiding Judge.

Due notice of intention to appeal was given and a stay of execution was granted pending such appeal. The following are the exceptions and grounds of appeal.

Exceptions.

* * * * * * *

4. The Court erred in overruling the plea in bar to the infliction of the death penalty by electrocution and the motion in arrest of judgment, for the reason that when the crime was charged to have been committed the penalty was death by hanging; whereas, the penalty of death by electrocution was substituted by the Act of 1912 and was ex post facto as to him; and the imposition of the sentence was in violation of the Constitution of the United States and of this State prohibiting the passage of ex post facto laws.

19 THE STATE OF SOUTH CAROLINA:

In Supreme Court.

THE STATE, Respondent,
vs.
JOE MALLOY, Defendant-Appellant.

Opinion by Eugene B. Grary, C. J.

The defendany was indicted and tried in July, 1912, for the murder of Prentiss Moore, on the 24th of November, 1910, and the jury rendered a verdict of guilty; whereupon the court sentenced him to be electrocuted on the 9th day of August, 1912, in the manner provided by the act, approved the 17th of -ebruary, 1912, which will be incorporated in the report of the case, together with section 946 of the Criminal Code of 1912, which prescribes the manner in which a person shall be hanged.

The defendant appealed upon the exceptions which will be reported.

The first question that will be considered is, whether the said act which changes the punishment for murder, from death by hanging to death by electrocution, was unconstitutional, on the ground that it was an ex post facto law, as to him.

Section 109 Criminal Code of 1902 is as follows: "Whoever is guilty of murder, shall suffer the punishment of death: Provided, however, That in each case, where the prisoner is found guilty of murder, the Jury may find a special verdict, recommending him or her to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole life time of the prisoner."

Prior to the act of 1912 the mode of execution, when the prisoner was sentenced for murder, was by hanging.

In Cooley's Constitutional Limitations, pages 319-320 the
20 author quotes with approval the following language of Chase, J., in the leading case of Calder v. Bull, 3 Dall. 386 as to ex post facto laws: "I will state what laws I consider ex post facto, within the words and the intent of the prohibition, 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was when committed. 3rd. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence and receives less or different tes-imony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. * * * But I do not consider any law ex post facto within the prohibition that modifies the rigor of the criminal law; but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of

conviction." The last sentence is quoted with approval in State v. Richardson, 47 S. C., 166.

In the case of Kring v. State, 107 U. S., 221, it was held that any law is an ex post facto law within the meaning of the Constitution passed after the commission of a crime charged against a defendant, which, in relation to that offense, alters the situation of the party to his disadvantage; and no one can be criminally punished except in accordance with the law of force when the offense was committed.

In that case the court quoted with approval the following language from the case of Hartung v. People, 22 N. Y., 95: "It is highly probable that it was the intention of the legislature to extend favor rather than increased severity towards the convict and others in her situation; and it is quite likely that had they been consulted they would have preferred the application of this law to their cases, rather than that which existed when they committed the offense of which they are convicted. But the case cannot be determined on such considerations. No one can be criminally
21 punished in this country. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and, according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. No State shall pass an ex post facto law, is the mandate of the Constitution of the United States."

The Court also quoted with approval the following language of Mr. Justice Washington, in United States v. Hall, 2 Wash. C. C. 366: "An ex post facto law is one which in its operation makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage."

In Murphy v. Commonwealth, 43 L. R. A. (Mass.) 154, it is said: "The objection to ex post facto legislation consists in the uncertainty which would be introduced thereby into legislation of a criminal or penal character and the injustice of punishing an act which was not punishable when done, or, of punishing it in a different manner than that in which it was punishable when done.

But not all retroactive legislation is unconstitutional as being ex post facto. The question in each case is whether it will increase the penalty or operate to deprive a party of substantial rights or privileges to which he was entitled when the offense was committed; or, in short, in relation to the offense and its consequences, will alter the situation of a party to his disadvantage." See also notes to the case of Rooney v. North Dakota, 196 U. S. 319, reported in Am. & Eng. Ann. Cases, 76.

A statute which merely regulates the manner in which the execution shall be conducted, by prescribing the time and manner of the execution and the number and character of the witnesses, is not ex post facto, though it applies to offences committed before its enactment. Halden v. Minnesota, 137 U. S., 491.

22 "The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary, rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution when the punishment is death within the limits of the State, is of no practical consequence to the criminal. On such a motion he is not entitled to be heard." Rooney v. North Dakota, 196 U. S., 319.

The foregoing authorities sustain the proposition that the punishment prescribed by law for an offense at the time it was committed cannot be changed by subsequent legislation unless the change is advantageous to the prisoner.

The appellant's attorneys argued that the act of 1912 was unconstitutional, by reason of the fact that the place of execution and the number of witnesses permitted or required by the act of 1912, were changed to the disadvantage of the defendant. The foregoing authorities also show that these objections are untenable. In the language of Mr. Cooley in his excellent work entitled Constitutional Limitations 322: "We have no doubt the privileges the respondent claims were designed and created solely as incidents of the severe punishment to which his offense formerly subjected him and not as incident of the offense." In this respect the statute is analagous to those which relate to penal administration or prison discipline and are not unconstitutional, even though the effect may be to enhance the severity of the confinement.

Murphy v. Commonwealth, 172 Mass. 264.

We now come to the pivotal question, whether the act of 1912 changing the punishment for murder from death by hanging to death by electrocution, shows that its tendency is to ameliorate the punishment by hanging.

In the case of In re Kemmler, 136 U. S., 436, the Court has under consideration the question, whether the New York statute providing that "punishment of death must in every case be in-
23 flicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death," was obnoxious to the provisions of the Constitution prohibiting the infliction of cruel and unusual punishment.

The first step which led to the enactment of the law in that State was the message of the Governor, in which he said: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature." The legislature accordingly appointed a commission to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity. They also reported a proposed bill, which was enacted. Mr. Chief Justice

Fuller in delivering the opinion of the court said: "Punishments are cruel when they involve torture, or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life. The courts of New York held that the mode adopted in this instance might be said to be unusual, because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishment as such; that it was for the legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the legislature was possessed of the facts upon which it took action; and that by evidence aliunde the statute that presumption could not be overthrown. They went further and expressed the opinion that upon the evidence the legislature had attained by the act, the object had in view in its passage * * * treating it as involving an adjudication, that the statute was not repugnant
24 to the Federal Constitution, that conclusion was so plainly right that we should not be justified in allowing the writ upon the ground that error might have supervened therein. * * * The enactment of this statute was, in itself, within the legitimate sphere of legislative power of the State and in our observance of those general rules prescribed by our system of jurisprudence; and the legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner or deprived him of due process of law.

In order to reverse the judgment of the highest court of the State of New York we should be compelled to hold that it had committed an error, so gross as to amount in law to a denial by the State of due process of law to one accused of crime or of some right secured to him by the Constitution of the United States.

We have no hesitation in saying that this we cannot do upon the record before us. "The writ of error was accordingly denied."

It is true the provision of the United States Constitution now under consideration was not before the court in that case but the decision clearly shows that the court regarded electrocution as a more humane method of punishment than that by hanging. It would have been surprising if the court had reached any other conclusion after considering the manner in which an execution by hanging is conducted. The rope around the prisoner's neck must be of the proper length and so adjusted that when he drops from the scaffold his neck will be broken, thus destroying the structural formation of the body. But suppose the rope is not of the proper length, or the noose is not properly adjusted, then there are instances, on record where the head was completely severed from the body, when the convict dropped from the scaffold. There are also numerous instances where the neck was not broken and the convict died of strangulation after several minutes of cconsciousness. We merely mention

the agony which must have been suffered during strangulation a
indicated by the bulging eyes, and draw the curtain over such a pi
ture. Suffice it to say that this court is satisfied that electrocutio
is a more humane method of execution than by hanging.

25 The exception raising this question is, therefore, overruled

The ruling of the court upon the former appeal in thi
case shows that the first, second and third exceptions cannot be su
tained.

The fourth exception has already been considered.

There are two reasons why the fifth exception cannot be sustained
In the first place the grounds of objection were not stated and, i
the second place, it has not been made to appear that the rights o
the defendant were thereby prejudiced.

The sixth exception is overruled for the reason that his Honor th
presiding judge simply meant to tell them that if they believed th
testimony of an expert they were not to disregard it merely becaus
the witness was testifying as an expert.

The seventh exception cannot be sustained, for the reason tha
the remark of the presiding judge was general and was to be under
stood as if it had been preceded by the word "if".

The eighth exception is overruled, for the reason that the defend
ant failed to present a request to charge the proposition for which
he now contends.

The ninth and tenth exceptions cannot be sustained, for the rea
son that the record fails to show an abuse of discretion on the par
of the presiding judge in ruling upon the competency of the juror
therein mentioned.

It is the judgment of this court that the judgment of the circui
court be affirmed and that tgis case be remanded to the circuit cour
for the purpose of having another day assigned for carrying int
execution the sentence of the court.

We concur: D. E. Hydrick, A. J.; R. C. Watts, A. J.; T. B
Fraser, A. J.

I dissent: C. A. Woods, A. J.

(Report.)

26 THE STATE OF NORTH CAROLINA:

In the Supreme Court, Fourth Circuit, Marlboro County, November
Term, 1912.

THE STATE, Plaintiff-Respondent,
vs.
JOE MALLOY, Defendant-Appellant.

Opinion by C. A. Woods, A. J., Dissenting.

Early in the morning of 24th November, 1910, Guy Rogers, a
youth of about seventeen years, and his friend, Prentiss Moore, sev-
eral years younger, left the homes of their parents in Bennettsville
for a morning's hunt, with the expectation of returning in time for

dinner. Upon their failure to return, the community united in a long and harrowing search, which resulted in finding the bodies of both the boys in a ditch about eleven hundred yards from the house of the defendant.

Prentiss Moore was killed by a gun shot wound in the back near the shoulder blade. The facts that the shot were somewhat scattered, and that there were no powder burns indicated that the shot was fired at least a little distance off. While the wound was necessarily fatal, some minutes might have intervened before death. The gunshot which killed Guy Rogers seems to have entered, in almost a solid mass, in front near the left nipple, making powder marks on the body, and leaving the gun wad sticking to the wound. Death must have been almost instantaneous. The body of Guy Rogers was lying in the ditch, and that of Prentiss Moore leaning against the side of the ditch. The one double barrel shot-gun which the boys had was lying on the side of the ditch, and near by was an empty shell.

The defendant was indicted and tried for the murder of Guy Rogers, and this appeal is from his conviction and sentence to death.

27 I concur in the reasoning and the conclusions of the Chief Justice as to all the exceptions except the fifth.

The case of the State depended on some circumstances alleged to be unfavorable to the defendant, but mainly on the testimony of Charlotte Easterling and Stephen Toms, both negroes, as to confessions to them by the defendant that he had killed the boys.

The witness, Charlotte Easterling, as was agreed on all sides, was utterly discredited by her numerous contradictions of herself. These contradictions culminated in her testifying at the trial to a confession of the defendant, and then confessing to in private the solicitor and on the stand that no confession had been made to her. The witness, Stephen Toms, then testified to confessions made to him, and was allowed to bolster up his statement by stating that at a certain time and place he had told one Collins of the defendant's confession. This testimony was clearly incompetent; State vs. Thomas, 3 Strobh., 269; State vs. Scott, 15 S. C., 434; State vs. Gilliam, 66 S. C., 419; State vs. McDaniel, 68 S. C., 304; and I am convinced that it was also prejudicial, especially in view of the fact that the defendant introduced testimony tending strongly to show that Toms was a professional witness having a bad reputation for veracity.

It seems to me that careful consideration of the evidence is convincing that the tragedy was one of deep mystery—requiring on the part of the jury most careful and anxious consideration of every particle of evidence before they could reach a verdict. They had to answer these serious questions: Were the boys murdered and thrown into the ditch, or was the tragedy due to an unusual and unexplainable accident? Was there any sufficient motive for the defendant to commit such a dreadful and monstrous crime? Were the circumstances proved by credible testimony affecting the de-

fendant not consistent with his innocence? Were the con-
28 fessions attributed to defendant really made by him, or were the witnesses who testified to them shown to be unworthy of belief? It cannot be doubted that the testimony as to the confessions was the strongest adduced against the defendant; and when the character of the witnesses from which this testimony came is considered, the conclusion seems irresistible that it was the right of the defendant to have excluded all incompetent testimony as to the confessions imputed to him, and denied by him, which may have contributed to the verdict.

This Court has set its face against technical objections to testimony and appeals depending on errors which do not affect the merits. But I am forced to the conclusion that in a case so full of mystery, justice requires that no material testimony set down by the law as incompetent should be admitted to effect the conclusion of the jury.

For this reason I think the judgment should be reversed and the cause remanded for a new trial.

29 [Endorsed:] 8511. The State of South Carolina. In the Supreme Court. The State, Resp'd't, v. Joe Malloy, Appel't. Opinion by Eugene B. Gary, C. J. Judgment affirmed. We concur: D. E. Hydrick, A. J.; R. C. Watts, A. J.; T. B. Fraser, A. J. I dissent: C. A. Woods, A. J. Report. Filed Supreme Court of S. C. Apr. 7, 1913. U. R. Brooks, Clerk.

Endorsed on cover: File No. 23,690. South Carolina Supreme Court. Term No. 172. Joe Malloy, plaintiff in error, vs. The State of South Carolina. Filed May 14th, 1913. File No. 23,690.

Supreme Court of the United States

OCTOBER TERM, 1914

No. 172

JOE MALLOY, *Plaintiff in Error,*

vs.

THE STATE OF SOUTH CAROLINA.

In Error to the Supreme Court of the State of South Carolina.

Argument of Stevenson, Stevenson & Prince, Counsel for Plaintiff in Error

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Supreme Court of the United States

OCTOBER TERM, 1914

No. 172

JOE MALLOY, *Plaintiff in Error,*

vs.

THE STATE OF SOUTH CAROLINA.

In Error to the Supreme Court of the State of South Carolina.

Argument of Stevenson, Stevenson & Prince, Counsel for Plaintiff in Error.

STATEMENT.

This case was a prosecution for murder. Defendant, Joe Malloy, was put upon trial at the Summer term (1912) of the Court of General Sessions for Marlboro county, South Carolina, charged with the murder of one Prentiss Moore. He was convicted of murder without a recommendation to mercy and was sentenced by the Court to death by electrocution (page 9 of the Transcript of Record). Due notice of intention to appeal was given and a stay of execution was granted pending his appeal to the Supreme Court of the State of South Carolina on various assignments of error. The judgment of the Circuit Court, however, was affirmed by the Supreme Court of South Carolina and the case remanded to the Circuit Court for the purpose of having another day

assigned for the purpose of carrying into execution the sentence of the Court (page 14 of Record).

From the judgment of the Supreme Court, however, he appeals to this Court on one assignment of error which is found set out at pages two and three of the Transcript of Record, and which is to the effect that the Supreme Court of South Carolina erred in holding that Joe Malloy is punishable with death by electrocution under the provisions of Act No. 402 of the Statutes at Large of South Carolina for 1912, by reason of the fact that, as to him, the said act is *ex post facto* and void under the provisions of the Constitution of the United States of America, in that at the time of the commission of the alleged crime, to wit, November 24th, 1910, the law in force in the State of South Carolina prescribing the punishment of those convicted of murder without a recommendation to mercy was that which is found in Sections 109-113 of the Criminal Code of South Carolina of 1902, providing that whoever is guilty of murder shall suffer the penalty of death, which act necessarily and properly carries with it the common law method of punishment by hanging. The infliction, therefore, of a sentence upon defendant which was not legal at the time of the alleged commission of the crime was in violation of the rights of appellant guaranteed him by the Constitution of the United States, Article I, Section 9, providing that no bill of attainer or *ex post facto* law shall be passed.

ARGUMENT.

At the time of the alleged commission of the crime the law regulating punishment upon the conviction of murder was found in Sections 109-113 of the South Carolina Criminal Code of 1902, providing that "whoever is guilty of murder shall suffer the punishment of death," and providing, further, a reduction of the punishment to imprisonment for life upon the recommendation to mercy by the jury. Sections 110-113 provide for the punishment of death in certain cases specified therein, such as killing by stabbing, causing death by obstructing a railroad, killing by poison and killing in a duel. The method of inflicting the death sentence as provided for in those sections was not the subject of statute law in South Carolina, the sections simply providing for the punishment of death. However, where the method of inflicting the death penalty is not prescribed the common law mode is adopted,

which, of course, is death by hanging. Ency. of Law, Vol. 21, p. 236, and note; *Dane* v. *People*, 5 Parker's Crim. L. (N. Y.), 364. This is further recognized in Section 114 of the same Code, which provides that persons convicted of rape shall suffer death by hanging in the same form and manner as is now provided by law for wilful murder.

It is needless, therefore, to discuss the proposition that under the laws referred to the legal punishment in South Carolina for murder without a recommendation to mercy was death, and death by hanging and in no other form. Upon the 17th day of February, 1912, however, over a year after the commission of the alleged crime, and four or five months before the defendant, Joe Malloy, was arraigned for trial, an Act was passed by the South Carolina Legislature entitled "An Act to prescribe the method of capital punishment in South Carolina," which is set out in full at pages 2 and 3 of the Transcript Record. We see at once that the effect of this Act is to absolutely repeal and nullify the provisions contained in Section 109 of the Criminal Code of South Carolina of 1902, under which provision the punishment was death by hanging. There is no saving clause in the Act of 1912 which would operate to keep in force and effect the punishment of hanging as to crimes committed before the passage of the new Act; it is simply a flat and positive enactment, repealing absolutely in unqualified terms the law which preceded it and thereby creating a nonexistence of any law by which to punish offenders who committed their alleged crimes before its passage and who were convicted thereafter. The contention of appellant is that as to his crime alleged to have been committed on Thanksgiving Day, 1910, the statute of 1912 is *ex post facto*, and, therefore, null and void in this particular case; that he cannot be electrocuted thereunder for this reason and that he cannot be hung under the provisions of the old law, that being a repealed law at the time of his conviction. Nothing, we submit, could be more clear and conclusive than the fact that this appellant cannot be punished under a statute which is on its face *ex post facto* as to his case. Not only is the punishment for murder without a recommendation to mercy completely removed by the new Act, but also the place for the infliction of the punishment is changed. Whereas, those who were convicted under the old law were hanged in the jail of the county—"within the jail or enclosure of the jail of the county" (South Carolina Criminal Code, 1902, Sec-

tion 1660)—now under the new Act they are to be taken to the State penitentiary at Columbia, confined in said penitentiary for a period of not more than twenty days nor less than two days before execution, and there executed. Whereas, under the old Act, in addition to the sheriff of the county and his deputies for assistants, the clergy, the State Solicitor, the attorney or attorneys who defended the convict, and the family of the convict, the sheriff was allowed to summons ten discreet persons to witness the execution; now, under the new Act, in addition to the executioner and at least two assistants, the prison surgeon and another surgeon, if the condemned person so desires, an electrician, the condemned person's counsel and relatives, if they so desire, and ministers of the Gospel not exceeding three, if they so desire, the execution may be witnessed by from twelve to twenty-four reputable citizens of the State, to be designated by the executioner, which inflicts upon the man condemned to suffer the highest and most abject punishment known to the law the compulsion of having his shame and disgrace revealed before at least two and from there anywhere up to as many as fourteen extra persons who could not have witnessed the execution under the old law. Can it truthfully be said that the infliction upon an unfortunate convict of the increased indignity of having more witnesses to his execution is not an increase in his punishment and does not operate to his detriment? It is an unquestioned doctrine of law that a criminal statute in order to escape the *ex post facto* odium must be shown to be in mitigation of the punishment inflicted by the statute which it repeals. Of course, if the repealing statute shows on its face that it is a decided change for the better from the convict's standpoint, an unquestionable amelioration of his condition, then it would not be held to be *ex post facto*, but unless this does so appear it should by no means be allowed to have a retroactive effect.

Let us consider the law on the subject as laid down and adhered to by the greatest authorities in the land. We cite in support of our contention the case of *Hartung* v. *People*, 22 N. Y., 95, set out by Judge Cooley in his wonderful treatise on Constitutional Limitations, at page 379, and approved by him in detail. In this case, the law providing for the infliction of capital punishment had been so changed as to require the party liable to this penalty to be sentenced to confinement at hard labor in the prison until the punishment of death should

be inflicted, and it further provided that such punishment could not be inflicted within one year nor until the Governor should issue his warrant for the purpose. Cooley says: *"The Act was evidently designed for the benefit of the party convicted,* and, among other things, to enable advantage to be taken for their benefit of any circumstances subsequently coming to light which might show the injustice of the judgment or throw any more favorable light on the action of the accused. Nevertheless, the Court held the Act inoperative as to offences before committed." Quoting from the opinion of Judge Denio in this case: "In my opinion it would be perfectly competent for the Legislature by a general law to omit any separable portion of the prescribed punishment. For instance, if the punishment were a fine and imprisonment, a law which should dispense with either of the fines imposed might, I think, be lawfully applied to existing offences, and so, in my opinion, the term of imprisonment might be reduced, the number of stripes decreased in cases punishable in that manner. Anything which applied to an individual sentence would finally fall within the idea of remission of a portion of the sentence would not be liable to objection, and any change which should be referable to prison discipline or penal administration, as its primary object might also be made to take effect upon past as well as upon future offences, as a change in the kind or manner of employment of convicts sentenced to hard labor, the system of supervision or means of restraint, or the like. Changes of this sort might operate to mitigate or decrease the severity of the punishment of the convicts, but would not raise any question upon the constitutional provisions we are considering. The change wrought by the Act of 1860 in the punishment of existing offences of murder does not fall within either of these exceptions. If it is to be construed to vest in the Governor a discretion to determine whether the convict should be electrocuted or remanded to prison at hard labor this would only be equivalent to what he might do under authority to commute the sentence. But he can, under the Constitution, only do this once for all. If he refuses the pardon the convict is executed under the sentence; if he grants it his jurisdiction of the case ends. The Act in question places the convict at the mercy of the Governor in office at the expiration of one year from the time of his conviction and of all of his successors during the life of the convict. He may be ordered to execution at any time upon any

notice or without notice. Under one of the repealed sections of the Revised Statutes it was arranged that a period should intervene between the period of execution of not less than four nor more than eight weeks. If we stop here the change effected by the statute that a limited time to be prescribed by the Court, or a pardon or a commutation of the sentence during that period on the one hand, and the placing of the convict at the mercy of the magistrate at the time and his successors to be executed at his pleasure at any time after one year, on the other, the sword is indefinitely suspended over his head, ready to fall at any time.

"It is not enough to say, even if that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the Constitution that it changes the punishment after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether the one or the other would be the most severe in a given case; that would depend upon the disposition and temperament of the convict. The Legislature cannot thus experiment upon criminal law. The law, moreover, prescribes one year's imprisonment at hard labor in the State prison in addition to the punishment of death. In every case of the execution of the capital sentence it must be preceded by the year's imprisonment at hard labor. True, the concluding portion of the judgment cannot be executed unless the Governor concurs by ordering the execution, but as both parts in any given case may be inflicted, and as the convict is consequently under this law exposed to the double infliction, it is, within both the departments which have been mentioned, an *ex post facto* law. It changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. *It is enough, in my opinion, that it changes it in any manner except by dispensing with visible portions of it.* But upon the other, announced by Judge Chase, where it is implied that there must be a change from a less to a greater punishment, this Act cannot be sustained.

"Judge Cooley says, continuing on in this case: 'This decision has since been several times followed in the State of New York. (*Shepard* v. *People*, 25 N. Y., 406; *Ratzky* v. *People*, 29 N. Y., 124; *Cockley* v. *People*, 5 Parker's Crim. Repts., 212.) And it must now be recognized as the settled law of the State that a law changing the punishment for an

offence committed before its passage is *ex post facto* and void under the Constitution, unless the change consists in the remission of some separable portion of the punishment before prescribed or it is referable to prison discipline or penal administration as its primary object. And this rule seems to us a sound and sensible one with perhaps this single qualification, that the substitution of any other penalty than that of death must be recognized as a mitigation of the penalty.' ".

We may say that this decision of the Court of Appeals of the State of New York, in addition to being ratified by Mr. Cooley, and thus being made into textbook law of the highest nature, has been set forth at length and approved by this Court in the case of *Kring* v. *State of Missouri*, 107 U. S., 221, 27 L. Ed., 506. We desire especially to call attention to another excerpt from Justice Denio's opinion in the above cited case of *Hartung* v. *People*, which the Supreme Court of the United States saw fit to set out in their opinion in the case of *Kring* v. *Missouri*, as follows: "It is highly probable that it was the intention of the Legislature to extend favor rather than increased severity to the convict and others in her situation, and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases rather than that which existed when they committed the offenses of which they were convicted. But the case cannot be determined on such considerations. No one can be criminally punished in this country except according to a law prescribed for his government before the supposed offense was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. No State shall pass any *ex post facto* law is the mandate of the Constitution of the United States." *Kring* v. *Missouri*, cites, also, *Greene* v. *Shumway*, 39 N. Y., 418, and *In re Petty*, 22 Kan., 477, where the same proposition is decided. Also, *State* v. *Keith*, 63 N. C., 140, where the Supreme Court of that State held that a law repealing a statute of general amnesty for offenses arising out of the rebellion was *ex post facto* and void, although both statutes were passed after the acts were committed. Also, most especially, we desire to call the attention of this Court to the strong language of the Massachusetts Supreme Court in the case of *Murphy* v.

Commonwealth, 43 L. R. A., 154, citing a number of other very strong authorities, holding that a statute which alters, or may alter in a substantial manner, the position of those convicted of crime prior to its passage is inoperative as to such. We quote as follows: "The objection to *ex post facto* legislation consists in the uncertainty which would be introduced thereby into legislation of a criminal or penal character and the injustice of punishing an act which was not punishable when done, *or of punishing it in a different manner than that in which it was punishable when done.* But not all retroactive legislation is unconstitutional as being *ex post facto.* The question in each case is whether it will increase the penalty or operate to deprive the party of substantial rights or privileges to which he was entitled as the law stood when the offense was committed; or, in short, in relation to the offense and its consequences, will alter the situation of the party to his disadvantage." Citing *Calder* v. *Bull*, 3 Dall., 386, 1 L. Ed., 647; *Coming* v. *Missouri*, 4 Wall., 277, 18 L. Ed., 356; *Ex parte Garland*, 4 Wall., 333, 18 L. Ed., 366; *Kring* v. *Missouri, supra; Medley, petitioner*, 134 U. S., 160, 33 L. Ed., 835; *Duncan* v. *Missouri*, 152 U. S., 377, 38 L. Ed., 485; *Thompson* v. *Utah*, 170 U. S., 343, 42 L. Ed., 1061; *Hartung* v. *People, supra; Shepard* v. *People, supra; Ratzky* v. *People, supra.* We also cite the case of *Thompson* v. *The State of Utah*, 170 U. S., 341, in which it was held that the substitution of a jury of eight persons in place of the common law jury in case of a crime committed before the change in the law constituted an *ex post facto* law. In *People* v. *Noland*, 115 N. Y., 660, the Court held that if the electrocution statute had repealed absolutely the hanging statute it could not be enforced thereafter, and that if the same had been done the law would have been *ex post facto*, as to murder committed prior to the passage of the Act, but that the Legislature expressly guarded against that by providing that the defendant committing a capital crime before the electrocution Act became effective should be hung. We respectfully submit that nothing could be more directly in point with the case at bar than this case. The only point of difference between them being that the Legislature in New York in enacting the eletcrocution statute saw fit to provide against the very contingency that has arisen in this case by the insertion of a saving clause as to offenses committed prior to the passage of the electrocution Act. And the Court of Appeals of New York has shown in

its opinion that this was a wise precaution, by holding positively that if this had not been done the electrocution Act would have been *ex post facto* law. See, also, *Ganvey* v. *People*, 6 Col., 559, 44 Am. St. Rep., 531; *Lindsay* v. *State*, 65 Miss., 542, 7 Am. St. Rep., 674. In this latter case the Court refused to punish under the old law, because punishment under it was for not more than one month imprisonment or one hundred dollars fine, while under the new law the punishment was a fine of not less than twenty-five dollars nor more than one hundred dollars. They cite Circuit Judge Marshall in 6 Cranch, 138, as follows: "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." The case goes on to say: "There has been much diversity of opinion as to what would constitute mitigation of punishment in such case, but the best and most sustained by reason is that a law changing the punishment for offenses committed before its passage is objected to as being *ex post facto*, unless the change consists of the remission of some separable portion of the punishment. It is enough for the Courts to render judgments according to law, without being required to determine the relative severity of the different punishments, when there is no common law standard in the matter by which the mind can be satisfactorily guided." See, also, *Carter* v. *Burt*, 12 Allen, 424; *People* v. *Hayes*, 31 Am. St. Rep., 375, and notes, page 387; *United States* v. *London*, 176 Fed. Rep., 976, holding that where a territorial law passed before admission to statehood required a grand jury to be composed of only sixteen men, and the United States Revised Statutes, Section 808, provides that a grand jury should consist of not less than sixteen nor more than twenty-three men, so far as it permits a grand jury to consist of more than sixteen persons which acts upon a charge of crime committed before admission to statehood is violative of the Constitution of the United States, which provides that no *ex post facto* law shall be passed, and as to such a change a grand jury of more than sixteen men is not a legally constituted grand jury. We also call attention to the case of *Ex parte Medley, petitioner*, 134 U. S., 160, 33 L. Ed., 835, a very strong case, holding that any law that is passed after the crime is committed for which the party is being tried, is an *ex post facto* law when it inflicts a greater punishment than the law annexed at the time the crime was committed or alters the situation of the accused to his disad-

vantage. See, also, *McIlvaine* v. *Bruce*, 142 U. S., 155, 33 L. Ed., 971. Also, *In re Kemler*, 136 U. S., 436, 34 L. Ed., 519. The Supreme Court of South Carolina in *City Council of Anderson* v. *O'Donnell*, 29 S. C., 355, held that an *ex post facto* law is where the punishment is increased or the rights changed from one to another to the prisoner's disadvantage after the crime was committed. See, also, *State* v. *Couler*, 31 S. C., 105, to the same effect, where the Court also says: "What might have been the effect if the Act of 1887 had prescribed a punishment *differing in kind* or increased in degree from the punishment by the old law we need not now consider, as the new law makes no alteration in kind and decreases the degree of punishment." See, also, *State* v. *Richardson*, 47 S. C., 166; *State* v. *Loftis*, 49 S. C., 443. Both the Couler and Loftis cases decided that a change of venire or increase in degree of punishment is *ex post facto*. Also, *Hadden* v. *Minn.*, 137 U. S., 483, 34 L. Ed., 734; *Rooney* v. *N. D.*, 196 U. S., 326, 50 L. Ed., 259. Authorities to the same effect as these already cited could be collated to such an extent as to increase this argument to a very bulky volume, but we deem it inadvisable and unnecessary to go to any greater length in expounding a proposition of law upon which this Court has so clearly expressed itself.

To recapitulate briefly, our contention is that if the repealing statute does not distinctly mitigate the punishment it is *ex post facto*. If there is not some step forward taken which would operate in the accused's favor it cannot be saddled upon him, not being enforceable at the time he made himself amenable to the criminal law. We also unhesitatingly contend, in view of these authorities, and many others, that a mere change in kind of punishment unaccompanied by a change in degree, is sufficient to constitute it *ex post facto*. The Courts cannot, and will not, undertake to say whether or not a change from hanging to electrocution is an increase or mitigation of punishment. Such an undertaking would require an investigation into the characteristics, personal traits, nervous system, likes and dislikes of each criminal (an interesting psychological problem, no doubt, but one which no Court will set itself to solve). The idea of electrocution is more horrible, doubtless, to many men than that of the gallows, and *vice versa*. The dispositions, feelings and sensibilities of people of all sorts, conditions and degrees of intelligence vary as widely as the night varies from the day. Shall

this Court say that Joe Malloy would prefer to take his seat in the electric chair rather than be hanged by the neck; and that the electrocution Act is, therefore, an act of charity and mercy, mitigating and extenuating his punishment? We think not. We think, also, that when it appears, as it unquestionably does, that the change in kind has been so great that the punishment has been absolutely revolutionized and bears no similarity whatever to the punishment which used to be inflicted, this Court will readily see that this plaintiff in error cannot be subjected to that which was unheard of at the time when he incurred the risk of criminal prosecution. In closing our argument on this exception we wish to review briefly in addition to the question of the radical change in kind of punishment, which assuredly cannot be stated arbitrarily to be a mitigation and a benefit to this plaintiff in error, a point which we have raised in this connection as to the effect of the new law in increasing the number of spectators to the gruesome sight of execution. The very minimum under the new law is two more than the maximum under the old law. Suffering is far from being confined to physical torture. In fact, to certain sensibilities and dispositions, mental anguish and shame, mortification and humiliation, and kindred feelings, are far more poignant in their grief and pain than any physical torment which the ingenuity of man can devise. One who is going to his death in disgrace and contumely naturally wishes the shameful spectacle to be witnessed by as few as possible, and shall this Court say that an increase in the number of curious onlookers, total strangers to the unfortunate victim, is not a decided increase in his punishment? We contend, therefore, that the Court below erred in failing to hold that the electrocution statute of South Carolina was unconstitutional, *ex post facto* and void as to this plaintiff in error.

All of which is respectfully submitted. W. F. Stevenson

STEVENSON, STEVENSON & PRINCE,
Attorneys for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1914

No. 172

JOE MALLOY, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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Argument of Thomas H. Peeples, Attorney General of South Carolina.

STATEMENT.

Joe Malloy, the plaintiff in error, was indicted and tried in July, 1912, for the murder of Prentice Moore on the 24th day of November, 1910, and was convicted of murder, without recommendation to mercy, the penalty for which is death. He was sentenced by the Court to death by electrocution. Due notice of appeal was given to the Supreme Court of South Carolina and stay of execution granted pending the appeal. The judgment of the Circuit Court was affirmed and the case remanded to the Circuit Court for the purpose of having another day set for the execution.

From the judgment of the Supreme Court the plaintiff in error appeals to this Court on one assignment of error, which is that the application of Act No. 402 of Statutes at Large of South Carolina, 1912, page 702, to the alleged crime with which the plaintiff in error is charged is *ex post facto* and void under the provisions of the United States Constitution; at the time of the commission of the alleged crime, to wit, November

24, 1910, the law in force in the State of South Carolina prescribing punishment for those convicted of murder without a recommendation to mercy was that which is found in Sections 109-113 of the Criminal Code of South Carolina, 1902, Sections 136-140 of the Criminal Code of South Carolina, 1912, providing that whoever is guilty of murder shall suffer the penalty of death, which Act necessarily and properly carried with it the common law method of punishment by hanging; the infliction, therefore, of a sentence upon appellant, which sentence was not legal at the time of the alleged commission of the crime, is claimed to be in violation of the rights of appellant guaranteed him by the Constitution of the United States, Art. I, Sec. 9, providing that no bill of attainder or *ex post facto* law shall be passed.

ARGUMENT.

At the time of the commission of the alleged crime, at the time of the trial of defendant, and at the present time the punishment for murder without a recommendation to mercy was and is death. Section 136 of the Criminal Code of South Carolina, 1912, provides that "whoever is guilty of murder shall suffer the punishment of death, provided, however, that in each case where the prisoner is found guilty of murder, the jury may find a special verdict recommending him or her to the mercy of the Court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner." However, before and up to the time of the passage of the Act of 1912, referred to on page two of the Transcript of Record, no method by which the death penalty should be inflicted in such cases was provided by statute. The Act referred to is in full as follows:

"No. 402.

AN ACT TO PRESCRIBE THE METHOD OF CAPITAL PUNISHMENT IN SOUTH CAROLINA.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That after the approval of this Act by the Governor all persons convicted of capital crime and have imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the State Penitentiary, at Columbia, under the direction

of the Superintendent of the Penitentiary instead of by hanging.

SEC. 2. The Board of Directors of the State Penitentiary are authorized and required to provide a death chamber and all necessary appliances for inflicting such penalty by electrocution and pay the costs thereof out of any funds in their hands. The expense of transporting any such criminal to the Sate Penitentiary shall be borne by the county in which the offense was committed.

SEC. 3. Upon the conviction of any person in the State of a crime, the punishment of which is death, it shall be the duty of the presiding Judge to sentence such convicted person to death according to the provisions of this Act, and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be transmitted by the Clerk of the Court of General Sessions in which said sentence is pronounced to the Superintendent of the State Penitentiary, at Columbia, not later than ten days prior to the time fixed in the sentence of the Court for the execution of the same, and in all cases it shall be the duty of the Sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, to convey such convicted person to the Penitentiary, at Columbia, to deliver him or her to the Superintendent of the State Penitentiary not more than twenty days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by an appeal, or granting of a new trial, or other order of Court of competent jurisdiction.

SEC. 4. At such execution there shall be present the executioner and at least two assistants, the Penitentiary Surgeon and one other surgeon, if the condemned person so desires, an electrician, the condemned person's counsel and relatives, if they so desire, ministers of the gospel, not exceeding three, if they so desire, and not less than twelve nor more than twenty-four respectable citizens of this State, to be designated by the executioner.

SEC. 5. The executioner and the attending physician shall certify the fact of such execution to the Clerk of the Court of General Sessions in which such sentence was pronounced, which certificate shall be filed by the Clerk with the papers in the case.

SEC. 6. The body of person so executed shall be delivered to relatives; and in case no claim is made by relatives for such body the same shall be disposed of as bodies of convicts dying in the State Penitentiary: *Provided*, That if nearest relatives of persons so executed desire that body be carried to former home, if in the State, the expenses for such transportation shall be paid by the Penitentiary authorities, who shall draw their warrant upon County Treasurer of county from which said convict came and said County Treasurer shall pay same and charge to item of Court expenses.

SEC. 7. That all Acts or parts of Acts inconsistent with this Act are hereby repealed.

Approved the 17th day of February, A. D. 1912."

It will be noted that this Act did not change the penalty of death to be inflicted in cases of murder, but only prescribed the method and manner by which the penalty in such cases should be inflicted. Is such a change in the law, a change relating only to the manner of infliction of the death penalty, one that operates to the disadvantage of the convict, and, therefore, *ex post facto* and inoperative within the terms of the Constitution of the United States?

Mr. Chief Justice Gary, in delivering the opinion of the Supreme Court of South Carolina in this case, quotes the language of Mr. Justice Chase in the case of *Calder* v. *Bull*, 3 Dall, 386, in which is defined four distinct classes of laws embraced by the *ex post facto* clause of the Constitution:

"1st. Every law that makes an action, done before the passing of the law and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence and receives less or different testi-

mony than the law required at the time of the commission of the offense in order to convict the offender."

Mr. Justice Chase further says: "But I do not consider any law *ex post facto* within the prohibition, that modifies the rigor of the law; but only these that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction."

In the case of *Kring* v. *Missouri*, 107 U. S., 221, the Court quotes, with approval, the charge of Mr. Justice Washington in the case of *U. S.* v. *Hall*, 2 Wash. (C. C.), 336, in which he says that "an *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed or which increases the punishment, or, in short, which, in relation to the offense or its consequence, alters the situation of a party to his disadvantage."

Applying these rules, can the case at bar be brought within any of the classes mentioned? It cannot be placed within the first class, because the offense of murder is now and has always been criminal and punishable as such by death. It cannot be brought within the second class, because the Act of 1912 does not change the punishment of death for conviction of murder without a recommendation to mercy. It cannot be placed within the fourth class, because the rules of evidence have not been changed.

This leaves as the only remaining question, whether or not the Act of 1912 comes within the third class of cases, changes the punishment and thereby inflicts a greater punishment than was annexed to the crime when committed; and if the punishment has been changed, has the situation of the plaintiff in error been altered to his disadvantage?

As before stated, the punishment for murder without a recommendation to mercy is death. The contention of the plaintiff in error as to the change of the place of execution and the number of witnesses allowed by the Act of 1912 to be present at the execution cannot be sustained.

In the case of *Holden* v. *State of Minnesota*, 137 U. S., 483, the Court says: "Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the wall of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons out-

side, are regulations that do not affect his substantial rights. The same observations may be made touching the restrictions in Section 5 as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the Legislature, in its wisdom, and for the public good could legally prescribe in respect to executions occurring after the passage of the Act and cannot, even when applied to offenses previously committed, be regarded as *ex post facto* within the meaning of the Constitution."

In the case of *Rooney* v. *North Dakota*, 196 U. S., 319, Mr. Justice Harlan, in delivering the opinion of the Court, says: "The latter law requiring the execution of the sentence of death to take place within the limits of the Penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in the case of some crime not involving life, the place of execution, when the punishment is death, within the limits of the State, is of no practical consequence to the criminal. On such a matter he is not entitled to be heard."

Governor Blease, in his annual message to the General Assemly of South Carolina, on the 9th day of January, 1912, made the following recommendation:

> "Electric Chair for Executions.—A committee should be appointed to investigate thoroughly the advisability of placing an electric chair in the State Penitentiary, to be used in cases where the death penalty is imposed, for it seems to me that this is a much more humane manner of execution than the barbaric form of hanging, or even worse—standing a man on the ground and jerking him up, which is practiced in some countries."

The General Assembly, at that same session, pursuant to this recommendation and being convinced of the fact that electrocution was a more humane manner of inflicting the death penalty, passed the electrocution Act of 1912, which is the Act now under consideration.

Mr. Chief Justice Gary, in delivering the opinion of the Supreme Court of South Carolina, says, as to this method of inflicting the death penalty: "We now come to the pivotal question, whether the Act of 1912 changing the punishment for

murder from death by hanging to death by electrocution, shows that its tendency is to ameliorate the punishment by hanging.

In the case of *In re Kemmler,* 136 U. S., 436, the Court had under consideration the question, whether the New York Statute providing the 'punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death,' was obnoxious to the provisions of the Constitution prohibiting the infliction of cruel and unusual punishment.

The first step which led to the enactment of the law in that State was the message of the Governor, in which he said: 'The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the Legislature.' The Legislature accordingly appointed a commission to investigate and report 'the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.' This commission reported in favor of electrocution by electricity. They also reported a proposed bill, which was enacted. Mr. Chief Justice Fuller, in delivering the opinion of the Court said: 'Punishments are cruel when they involve torture, or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life. The Courts of New York held that the mode adopted in this instance might be said to be unusual, because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishment as such; that it was for the Legislature to say in what manner sentence of death should be executed; that this Act was passed in the effort to devise a more humane method of reaching the result; that the Courts were bound to presume that the Legislature was possessed of the facts upon which it took action; and that by evidence *aliunde* the statute that presumption could not be overthrown. They went further and expressed the opinion that upon the evidence the Legislature had attained by the Act, the object had in view in its passage, * * * treating it as involving an

adjudication, that the statute was not repugnant to the Federal Constitution, that conclusion was so plainly right that we should not be justified in allowing the writ upon the ground that error might have supervened therein * * *. The enactment of this statute was, in itself, within the legitimate sphere of legislative power of the State and in our observance of those general rules prescribed by our system of jurisprudence; and the Legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its Courts have sustained that determination. We cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner or deprived him of the process of law.

In order to reverse the judgment of the highest Court of New York we should be compelled to hold that it has committed an error, so gross as to amount in law to a denial by the State of the due process of law to one accused of crime or of some right secured to him by the Constitution of the United States.

We have no hesitation in saying that this we cannot do upon the record before us. 'The writ of error was accordingly denied.'

It is true the provision of the United States Constitution now under consideration was not before the Court in that case, but the decision cleary shows that the Court regarded electrocution as a more humane method of punishment than that by hanging. It would have been surprising if the Court had reached any other conclusion after considering the manner in which an execution by hanging is conducted. The rope around the prisoner's neck must be of the proper length and so adjusted that when he drops from the scaffold his neck will be broken, thus destroying the structural formation of the body. But suppose the rope is not of the proper length, or the noose is not properly adjusted, then, there are instances on record, where the head was completely severed from the body, when the convict dropped from the scaffold. There are also numerous instances where the neck was not broken and the convict died of strangulation after several minutes of consciousness. We merely mention the agony which must have been suffered during strangulation indicated by the bulging eyes, and draw the curtain over such a picture. Suffice it to say that this

Court is satisfied that electrocution is a more humane method of execution than by hanging."

In the case of *In re Kemmler, supra,* a voluminous mass of testimony was taken by the Court below as to the effect of electricity as an agent of death. Commenting on this testimony, Mr. Justice Dwight, in delivering the opinion of the Supreme Court of New York, in that case, stated: "We think that the evidence is clearly in favor of the conclusion that it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless death."

Mr. Justice O'Brien, of the Court of Appeals of New York, to which the Kemmler case was prosecuted, held that the determination of the Legislature that the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the Court in capital cases, was conclusive.

The Kemmler case was heard and decided twenty-five years ago—in the year 1890—and at a time when electrocution as a means of inflicting the death penalty was only an experiment. Even at that time and before the wonderful strides that have been made in the science of electricity during the past twenty-five years—a quarter of a century—the Courts recognized, and so held, that electrocution was a more humane method of inflicting the death penalty than by hanging. If that should be true, and the case at that time, why should it not be the more so at the present time, in view of the marvelous advances made by experiment and increased knowledge of the science of electricity?

The Encyclopædia Britannica, 11th Edition, Vol. IX, page 210, in speaking on the subject of electrocution, says:

> "When properly performed the effect is painless and instantaneous death. The mechanism of life, circulation and respiration ceases with the first contact. Consciousness is blotted out, and the prolonged application of the current ensures permanent derangement of the vital functions beyond recovery. Occasionally the drying of the sponges through under generation of heat causes desquamation or superficial blistering of the skin at the site of the electrodes. Post mortem, discoloration, or post mortem

lividity, often appears during the first contact. The pupils of the eyes dilate instantly and remain dilated after death."

The New International Ency., Vol. VI, page 780, on the same subject, says:

"A method of inflicting the death penalty by passing through the body of the doomed criminal a current of electricity.

It represents the latest attempt to rob the infliction of the death penalty of the revolting features of the prevalent mode of execution by hanging. While not entirely successful in this aim, it has in some parts of the United States been accepted as a more humane method of capital punishment than that which it is aimed to supersede. It was adopted in New York in 1888, Ohio in 1896, Massachusetts in 1898. The legislation which put it into effect in New York was based upon the recommendation of a commission appointed to 'investigate and report to the Legislature the most humane and approved method of carrying into effect the sentence of death in capital cases.' Notwithstanding the eminence of the commissioners, the prolonged and careful investigation which they gave to the subject, and the deliberate and cautious conduct of the Legislature in dealing with the report, the statute adopted for the purpose of giving effect to the conclusion of the commission, and the changing the mode of executing the death sentence from hanging to electrocution, was assailed as unconstitutional, on the ground that it provided for the infliction of a cruel and unusual punishment. This contention was not sustained by the Courts. On the contrary, they agreed with the commission that the application of electricity to the vital parts of the human body, under the conditions and in the manner contemplated by the statute, must result in instantaneous and painless death, and, therefore, would be a far more humane method of inflicting the death penalty than that by hanging. See *People ex rel. Kemmler* v. *Durston* (119 New York Reports, 557, 1890); 41 Albany Law Journal (242, 361, 382, 425, 489, 1890); consult, also, the authorities referred to under Punishment."

In addition to what has been said, it may be added that this method of inflicting the death penalty has been adopted in twelve of the States, viz.: Arkansas, Indiana, Kentucky, Massachusetts, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina and Virginia; and from the best obtainable information the adoption of this method of execution has been caused in each instance by an endeavor to provide a more humane method of inflicting the death penalty.

In view of these facts it cannot be successfully maintained that the passage of this Act of 1912 changes the form of punishment so that it thereby inflicts a greater punishment than was annexed to the crime committed before the passage of the Act. The situation of the convict is not only not altered to his disadvantage, but on the other hand, it has been altered to his advantage. The Act of 1912 did not create a new offense, nor aggravate or increase the enormity of the crime, for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offense. The changes in the manner and method of punishment from hanging to electrocution, looked at in the light of reason and common sense, are to be taken as favorable rather than as unfavorable to the accused.

Any statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime.

Rooney v. *North Dakota*, 196 U. S., 319.
Calder v. *Bull*, 3 Dall, 386.
Story, Const., 1345.
Cooley, Const. Lim., 267.
Com. v. *Gardner*, 11 Gray, 443.
1 Bishop Crim. Law, 280.

All of which is respectfully submitted.

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